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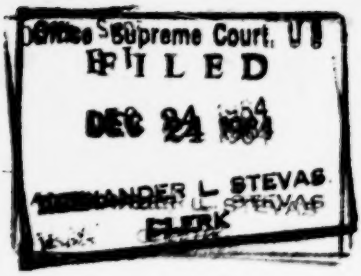

No.

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1984

DR. KEITH GREAVES, M.D., MEDIC KEITH HUGHES, DR. ROBERT GREER, M.D., SALT LAKE COUNTY, et al., PETITIONERS.

-vs-

DANIEL HOWARD BEE,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a mentally ill pretrial detainee have a right to refuse antipsychotic medication under the Due Process Clause of the Fourteenth Amendment or the Right of Privacy Right or the First Amendment?

2. Did the Court of Appeals err in failing to recognize that a state's right and duty to treat mentally ill pretrial detainees were legitimate state concerns justifying the forced medication of a mentally ill pretrial detainee?

3. Did the Court of Appeals err in failing to recognize that the state had a legitimate governmental concern in maintaining a mentally ill pretrial detainee's competency to stand trial by forcibly medicating the detainee pursuant to a physician's order?

4. Did the Court of Appeals err in recognizing that the state's interest in maintaining jail safety and security by forcibly medicating a mentally ill pretrial detainees was outweighed by the detainee's liberty interest except in the case of substantial evidence of an emergency situation?

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OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra) is reported at 744 F. 2d 1387 (10th Cir. 1984). The opinion of the District Court of Utah is not reported. (App B. infra).

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on September 24, 1984. The jurisdiction of this Court is now sought pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment to the Constitution of the United States which provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

This case also involves Section 1 of the Fourteenth Amendment

to the Constitution of the United States which reads as follows:

> "All persons born on naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (emphasis added).

STATEMENT

Plaintiff-respondent (Bee), an individual with a chronic mental illness (schizophrenia), was booked into the Salt Lake County Jail on August 9, 1980, and indicated to jail staff that he required thorazine and valium. Within 4 days thereof, he

began experiencing mental problems, hallucinations and threatened suicide if not given his medications. Subsequently, Bee was evaluated by a mental health worker and referred to Dr. Greer, a licensed psychiatrist who evaluated him, found him to be mentally ill and in need of medication, and accordingly prescribed mellaril. Later Dr. Greaves, the jail physician, also saw Bee and, at his request, prescribed thorazine for him. Bee voluntarily took the medications, and as a result thereof, no longer complained of hallucinations. (Record, Vol. I p. 92, Exh. A, B, C, E, G, H, I, J; Record Vol V. Depo. Greer pp. 5 & 6; Record, Vol VI p. 54, 66, 67, & 68).

On August 26, 1980, Bee was ordered by a State District Court to undergo an evaluation of his competency to stand trial pursuant

to Section 77-15-1, et seq., U.C.A. 1953. (Appendix C) The State Hospital psychiatrists diagnosed Bee as schizophrenic and found him to be mentally ill in an unmedicated state, as well as, threatening, violent and hallucinating. Further, they found that Bee needed antipsychotic medication to maintain his competency to stand trial. Antipsychotic medication was prescribed and administered to Bee at the State Hospital and found to normalize him by improving his thought processes, decreasing his incidences of violent destructive behavior, decreasing his mental symptoms and his abnormal and threatening hallucinations. State Hospital records reflect that Bee experienced no extrapyramidal effects from the medication. (Record, Vol. I,

p. 92, affidavit of Dr. Breck Lebegue, Exhibits K & L).

Bee was returned to the jail on September 23, 1980 and the next day appeared for a competency to stand trial hearing with his attorney. Based upon the reports of two State Hospital psychiatrists, the State Court found Bee competent to stand trial and ordered him held in jail. Further based upon the recommendation of Dr. Van Austin, the court ordered Bee medicated with thorazine while awaiting trial. (Record, Vol. 1, p. 929, Exhibit S).

When Bee was returned to the jail on September 23, a letter from the state hospital accompanied him which advised jail personnel of Bee's mental illness and of the medications required to keep him competent. Jail mental health evaluated him and confirmed Bee could be managed well on

medications. (Record Vol I, p. 92, Exhibits L & S, Exhibit 7; Record Vol. I, p. 193).

On September 24, 1980, Dr. Greaves prescribed thorazine for Bee pursuant to the State Court's order and the State Hospital's recommendation. Dr. Greaves did not prescribe or order that the thorazine be given to Bee involuntarily. (Record Vol. Depo. Greaves, VI p. 54-55, 57, 58, 60, 62, & 63).

Bee voluntarily took thorazine orally from September 24, 1980 until October 15, 1980, and then began refusing it. Thereafter, he began acting out, being loud and often calling for the jail guard. Dr. Greer examined Bee on October 21, 1980, at the request of jail mental health, but has no independent recollection of that examination, other than the notes he wrote in the jail records. At his

deposition, Dr. Greer reconstructed that Bee was mentally ill, thrashing about, disoriented, provocative of assault on himself or assaultive of others, frightened and refusing oral medication in order for him to have entered an intramuscular shot. Based upon his knowledge of Bee's treatment at the State Hospital, his observations, information from the jail mental health staff, his evaluation and clinical judgment, he prescribed thorazine intramuscularly until the oral dosage could be resumed. Dr. Greer testified that Bee's threatening behavior, his dangerousness to himself and others, his deteriorating mental condition and the emergency nature of the situation prompted him to make the intramuscular order. Further, he based the intramuscular order upon his clinical judgment that Bee was in greater danger without medication than by

being medicated. A light to moderate dosage was prescribed. While Dr. Greer intended that the intramuscular shot could be repeated once, the jail medic thought it could be repeated indefinitely. (Record, Vol. V. Depo. Greer, p. 8, 10, 11, 16, 19, 21, 33, 34).

Thorazine benefits mentally ill persons such as Bee because it cuts down on the amount of filtered information that is derived from memories of past traumas which cause the person's assaultive actions. Thorazine also benefits non-assaultive persons--those suffering from vivid and frightening hallucinations which make the person miserable. Treating schizophrenic persons such as Bee with thorazine is and was accepted medical practice and the withholding of thorazine probably constituted malpractice. (Record, Vol V, Depo. Greer p. 36-37).

Bee was thereafter, over his verbal objections, given an intra-muscular thorazine shot on one occasion--October 21, 1980. Bee brought suit in the U.S. District Court for the District of Utah under 42 U.S.C. Section 1983, charging the County and several of its employees with violating his liberty interests and privacy rights by forcibly medicating him.[1] After completion of discovery, both parties moved for Summary Judgment and the District Court granted it to the defendants-petitioners. (Record, Vol. I, p. 92, 193, 248; Record Vol VII).

---

[1]Defendants: Salt Lake County, Roger Jones, Security Officer; Capt. Brady, Jail Commander; Sheriff Hayward; Salt Lake County Commissioners Salter, Dunn, Hutchinson, Barker and Stewart.

Bee appealed the grant of Summary Judgment and the Tenth Circuit reversed because it found that there were material issues of fact concerning the defendants-petitioners' claimed interests in forcibly medicating Bee. Further, it found that a pretrial detainee had qualified liberty interests under the Due Process Clause of the 14th Amendment, the Right of Privacy and the 1st Amendment to accept or reject potentially dangerous antipsychotic drugs. The Circuit Court then weighed the competing interests of the parties and found no legitimate interest in defendants-petitioners' right and duty to treat mentally ill inmates; found no legitimate interest in maintaining Bee's competency to stand trial; and found that the interest in maintaining jail security and order were outweighed, except in an emergency, by

Bee's liberty interest. The case was remanded to the lower court to resolve the factual issues of whether an emergency existed and whether the possibility of intramuscular shots of thorazine over an indefinite period of time was an exaggerated response to the situation.

REASONS FOR GRANTING THE PETITION

I. THE CONSTITUTIONALITY OF FORCIBLY MEDICATING MENTALLY ILL PRETRIAL DETAINEES IS AN IMPORTANT QUESTION WARRANTING DECISION BY THIS COURT.

The constitutionality of forcibly medicating mentally ill pretrial detainees has never been considered by this Court, nor has it been considered by any federal courts other than the Utah District Court and the Tenth Circuit in this case. Several federal courts have considered the constitutionality of forced medication of prisoners with antipsychotic drugs and found that prisoners have no constitutional right

to refuse the antipsychotic medications. (Appendix D) The Utah District Court obviously relied upon these cases in rendering its decision. On the other hand, other federal courts that have considered the constitutionality of forced antipsychotic medication in the civil commitment area have found that civilly committed patients have a constitutional right to refuse antipsychotic medication. (Appendix D). The Tenth Circuit Court clearly relied upon these decisions in reaching its decision even though there is no uniformity of decision among those courts concerning the constitutional basis for refusing medication, what procedures are required before forcibly medicating a patient, nor what constitutes an emergency justifying forced medication. Additionally, although this Court vacated and remanded two of

the forced medication cases involving civil committed persons to appellate courts for reconsideration in light of the Youngberg v. Romeo, 457 U.S. 307 (1982) case, [Scott v. Plante, 458 U.S. 1101 (1982); and Rennie v. Klein, 458 U.S. 1119 (1982)] and vacated and remanded another forced medication of a civilly committed person case for a determination of dispositive state law [Rogers v. Okin, sub nom. Mills v. Rogers, 457 U.S. 291 (1982)], the law remains unsettled in the civil commitment area of forced medication.

Petitioners, as jail administrators, contend that the Tenth Circuit Court's total reliance upon the civil commitment cases for finding that pretrial detainees have a right to refuse antipsychotic medication was inappropriate in light of the more pertinent and analogous prison cases which recognized no right of prisoners

to refuse medication. Specifically, the concerns the courts may have had in protecting the rights of civilly committed individuals from forced medication do not exist in a jail, since it is feasible that once a mentally ill individual has been committed to a hospital all of the state's concerns/interests are satisfied or terminated and commitment should not be used as a basis for involuntary antipsychotic treatment. This does not hold true for the jail whose concerns are to hold individuals ready for trial. Further, jails, unlike hospitals are not long-term treatment facilities, nor do jails have the facilities, personnel or treatment alternatives of hospitals. Also, jails have a legitimate and recognized interest in maintaining order and security and obviously cannot allow assaultive, disruptive

and mentally ill inmates to go untreated since they tend to incite other inmates, can cause themselves to be subjected to violence and often assault other inmates or jail staff.

II. THE TENTH CIRCUIT MISAPPLIED EXISTING SUPREME COURT CASELAW.

The Tenth Circuit Court's reversal of the lower court was based upon recognition of a right to refuse unwanted medication, albeit a qualified one, protected by the right of privacy, the First Amendment and Due Process and an erroneous application of a balancing of competing interests tests rather than the rational basis standard inquired by Bell v. Wolfish, 441 U.S. 520 (1979).

A. THE RIGHT OF PRIVACY DOES NOT EXTEND TO FREEDOM FROM NEEDED MEDICAL TREATMENT IN A JAIL.

The Tenth Circuit Court relied upon the Roe v. Wade, 410 U.S.

113 (1973) and Whalen v. Roe, 429 U.S. 589 (1977) cases for recognition of the right of a mentally ill pretrial detainee to be free from antipsychotic medication because of the protential adverse side effects. Neither of those cases involded facts nor interest similar to the present case. Since the Whalen case, supra, specifically noted in fn. 26 at 599 that the privacy cases had always dealt with marriage, procreation, contraception, family relationships, child rearing and education. Additionally, this Court held in the Bell case, while discussing the constitutional rights of pretrial detainees, that the detainee's desire to be free from discomfort does not rise to the level of the fundamental (liberty) interests delineated in such cases as Roe, supra and others. 441 U.S. at 534. Petitioners submit that

these cases do not warrant an extension of the privacy right to allowing mentally ill pretrial detainees in rights to refuse necessary and properly prescribed antipsychotic medication.

Additionally, predicating a privacy right upon the Davis v. Hubbard, 506 F.S. 915 (1980) case was unfounded because the case dealt with the privacy right of a civilly committed patient in a state hospital to refuse medication, not with the right of a mentally ill pretrial detainee to refuse medication in a jail. Moreover, the facts in that case established that medication was not only overly prescribed but freely prescribed for the convenience of the staff, by licensed and unlicensed physicians and often upon only the recommendations of attendants; that the physicians often prescribed

medication without seeing the patients and that the practice was not supported by any sound medical course of treatment. There is no such evidence in the present case since the medication prescribed was the recommended medical treatment for Bee's illness and was prescribed following a physician's examination and determination that Bee needed this type of medication. Furthermore, the Circuit Court erroneously ignored the more pertinent and analogous prison cases cited by petitioners, wherein mentally ill prisoners were repeatedly held not to have any right to refuse antipsychotic medication. (Appendix D).

Recognition of a right to privacy in pretrial detainees in refusing medicating is contrary to the Bell decision, supra, wherein this Court specifically recognized that

loss of freedom of choice and privacy are interest incidents of pretrial detention. 441 U.S. at 537. Clearly to allow mentally ill pretrial detainees to choose their treatment or to refuse necessary treatment would interfere with, or make impossible, the jail's objective in holding pretrial detainees ready for trial, since the detainee could refuse treatment that would make him competent to stand trial, thereby delaying the trial indefinately. If the detainee continued to remain incompetent to stand trial, the charges would have to be dismissed and he would thereby avoid the criminal justice system.

B. PRETRIAL DETAINEES HAVE NO LIBERTY INTEREST IN REFUSING PROPERLY PRESCRIBED MEDICATION.

The holding in Youngberg v. Romeo, 457 U.S. 307 (1982) case does not support the premises suggested by the Circuit Court that there is a

liberty interest for pretrial detainees in refusing necessary and properly prescribed antipsychotic medication. Rather, Youngberg recognized that a mentally retarded and committed person retained qualified and somewhat conflicting liberty interests in safety and freedom from unreasonable bodily restraint, not that mentally ill pretrial detainees have a liberty interest in refusing antipsychotic medication properly prescribed by an authorized mental professional nor in avoiding the possible adverse effects of the medication.

The Vitek v. Jones, 445 U. . 480 (1980) case does not support the assertion that a liberty interest exists in the pretrial setting to be free from forced medication with a properly prescribed antipsychotic drug. That case, unlike the case under consideration, involved the

involuntary commitment/transfer of a prisoner to a state hospital, which in turn resulted in greater limitation on freedom of action, stigmatizing consequences of being labeled "mentally ill", and mandatory behavior modification, all of which were held to combine to make the transfer a major change in the conditions of confinement amounting to a grievous loss to the prisoner. Moreover, the Circuit Court ignored the holding in Vitek that changes in conditions of confinement having a substantial adverse impact on a prisoner were not alone sufficient to invoke the protections of due process, so long as the condition or degree of confinement was within the scope of the sentence imposed upon the prisoner. The treatment of Bee in this case was within the scope of pretrial confinement. It is not unreasonable or unexpected that pretrial detainees

are required to accept medical care provided on the basis of a professional's determination of need, in order to prevent unnecessary suffering and unwarranted dangers to themself or others. It is with the reasonable scope of pretrial confinement that detainees are prevented from threatening or disrupting jail security and order, and are made and maintained competent to stand trial, even though they, if given the choice, would refuse medical treatment.

Nevertheless, the Circuit Court in this case found on the basis of the Vitek case that even though a medical question was involved, the due process protections of notice, hearing and an independent decision maker were required. Such a finding is clearly contrary to this Court's decision in the Youngberg case, supra, wherein due process in the medical treatment area

was held to require only the exercise of professional medical judgment. Moreover, the Circuit Court ignored the Parham v. J.R., 442 U.S. 584 U.S. 584 (1979) case by failing to weigh the right to refuse medication against fiscal and administrative burdens entailed by requiring such procedural due process.

C. THE FIRST AMENDMENT DOES NOT PROHIBIT FORCED MEDICATION OF PRETRIAL DETAINEES.

The Circuit Court relied solely upon cases dealing with the claimed right of the civilly committed in determining that the First Amendment protected Bee from forced medication and since it is not a settled matter of law that the civilly committed have the right to refuse medication under the First Amendment; hence, reliance upon those cases was unfounded. Also, since state hospitals and jails are not identical

facilities, the rights of the individuals in those facilities are not necessarily identical. The Circuit Court erred in extending First Amendment right claimed by civilly committed patients to mentally ill pretrial detainees without any consideration or discussion of the differences in facilities, personnel and objectives in state hospitals and jails, as well as, the difference between civilly committed persons and pretrial detainees.

III. THE CIRCUIT COURT IMPROPERLY BALANCED STATE AND JAIL CONCERNS AGAINST PRETRIAL DETAINEE RIGHTS.

A. PETITIONERS' RIGHT AND DUTY TO PROVIDE ADEQUATE MEDICAL CARE OUTWEIGHED ANY RIGHT TO REFUSE MEDICATION.

Although the Tenth Circuit Court had long recognized that correctional officials not only had the authority, but also the constitutional duty, to provide

necessary medical treatment to both prisoners and pretrial detainees, it refused in this case to recognize this right and duty as constituting legitimate state concerns justifying the forced medication. [e.g. Dewell v. Lawson, 489 F.2d 112 (10th Cir. 1976); Daniels v. Gilbreath, 668 F.2d 477 (10th Cir. 1982)]. Furthermore, the Court refused to follow prior decisions wherein it had recognized that prisoners do not have the right to treatment of their choice. Henderson v. Sec. of Corrections, 518 F.2d 694 (10th Cir. 1975); Coppinger v. Townsend, 398 F.2d 392 (10th Cir. 1968).

In refusing to acknowledge these rights and duties as legitimate state concerns, the Circuit Court misinterpreted and further confused the law.

B. MAINTAINING THE COMPETENCY OF A PRETRIAL DETAINEE TO STAND TRIAL IS A LEGITIMATE INTEREST IN MANAGING A JAIL IN A SAFE, ORDERLY AND EFFICIENT MANNER.

The Tenth Circuit singled out the claimed right to maintain Bee's competency to stand trial from the many claimed state interests in forcibly medicating Bee and found that this claimed interest was not, in and of itself, a legitimate interest for two reasons. First, it found that maintaining Bee's competency was not a legitimate interest because a State Court judge had found Bee competent to stand trial. This finding completely ignored the evidence that Bee was competent only after treatment with thorazine at the State Hospital and further that he would remain competent only if he were continued on thorazine. Second, it found that the competency interest was unrelated to Bee's well being or of those around him, and not based upon his legitimate

treatment needs in accordance with accepted medical practice. None of the evidence supported those findings since it was uncontroverted that Bee suffered from a chronic mental illness (schizophrenia) and was dangerous, abusive, disruptive and provocative of assault while unmedicated, that the decision to medicate was based upon several psychiatrists determinations, that it was in Bee's best medical interests to be medicated, and that the medication prescribed (thorazine) was the accepted medical treatment for schizophrenics such as Bee.

Moreover, the Tenth Circuit Court erroneously stated that Utah in the case, A.E. v. Mitchell, 724 F.2d 864 (10th cir. 1983) had recognized the right of mentally ill person not to be subjected to involuntary mental health treatment absent a hearing and a finding of incompetency. However,

A.E. v. Mitchell, dealt only with civilly committed persons and the constitutionality of the civil commitment procedure, not with pretrial detainees nor with the incompetency to stand trial procedure. Indeed, Utah law only requires that medications in a mental health facility be prescribed upon a physician's determination of the person's medical needs. (U.C.A. Section 64-7-47, App. E). Clearly, Utah law has not recognized the right of pretrial detainees not to be subjected in involuntary mental health treatment.

Petitioners submit that maintaining the competency of a pretrial detainee is so inherent in the safe, orderly and efficient management of a jail that the Circuit Court erred in rejecting this interest.

C. THE CIRCUIT COURT MISAPPLIED ITS OWN HOLDINGS TO THE FACTS.

The Circuit Court found that absent an emergency, the forcible medication of an antipsychotic drug was not reasonably related to legitimate goals of jail safety and security. In order for an emergency to exist, it found that professional judgment had to be exercised which included balancing the detainee's interest in freedom from medication against the jail's concern for safety of its occupants. Given this standard, the Court completely ignored the testimony of Dr. Greer that he considered all of those interests in arriving at his decision to order forced medication.

Furthermore, the Court found that involuntary medication had to be the product of professional judgment by appropriate medical authorities and had to include a weighing of certain

factors. It then refused to recognize that the evidence complied with or satisfied those requirements.

Most importantly, the Circuit Court substituted its own opinion for the opinion of professional decision makers throughout its decision. That is, it recognized that correctional officials are entitled to deference in the management of the facility then refused to give any such deference and it recognized the presumed validity of medical professionals' decisions, then suggested that other treatment alternatives should have been explored (i.e. seclusion or tranquilizers). Also, the Court erroneously placed the burden on the petitioners to prove that the forced medication was not an exaggerated response, as opposed to determining if Bee had established substantial evidence in the record, as required by the Bell decision, supra,

to show an exaggerated response by petitioners. Finally, the Circuit Court held that the less restrictive or intrusive means must be explored prior to forced medication, contrary to this Court's decision in Romeo, supra.

CONCLUSION

The petition for a writ of certiorari should be granted for the following reasons:

1. The constitutionality of forcibly medicating mentally ill pretrial detainees with antipsychotics has never been decided by this Court.

2. The constitutionality of forcible antipsychotics medication in prison and mental health settings is the subject of diverse opinions among the federal courts and jail administrators need clarification as to which, if any of those holdings, governs the treatment of mentally ill pretrial detainees.

3. The Tenth Circuit ignored Supreme Court direction in deciding this case.

RESPECTFULLY SUBMITTED,

this 21st day of December, 1984.

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Salt Lake County Attorney

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Deputy County Attorneys
Counsel for Petitioners

APPENDIX A

Daniel Howard BEE, Plaintiff-Appellant,

-vs-

Dr. Keith GREAVES, Medic Keith HUGHES
and
Dr. Robert GREER, Defendants-Appellees

No. C-82-1288

United States Court of Appeals,
Tenth Circuit

September 24, 1984

Daniel Howard Bee filed this Action for damages under 42 U.S.C. Section 1983 (1976), claiming that employees of the Salt Lake County Jail in Utah administered the antipsychotic drug thorazine to him against his will while he was detained there prior to trial. Defendants include the sheriff, the director of security in the jail, the supervisor of the jail, the jail physician, a psychiatrist employed by Salt Lake County Mental Health, and several County Commissioners.

Defendants do not deny that Bee was forcibly medicated, but they assert that a variety of state interests justified the procedure. The district court granted summary judgment for defendants. Because we believe there are material, disputed fact issues which preclude summary judgment, we reverse.

I.

BACKGROUND

When reviewing a Summary Judgment, we consider the record in the light most favorable to the party opposing the motion, United States v. Diebold, Inc., 369 U.S. 654, 655 (1962), and resolve all ambiguities and disagreements in his favor. Security National Bank v. Belleville Livestock Commission Co., 619 F.2d 840, 847 (10th Cir. 1979); Webb v. Allstate Life Insurance Co., 536 F.2d

336, 339-40 (10th Cir. 1976). Viewed in this light, the record reflects the following facts.

Plaintiff Bee was booked into the Salt Lake County Jail on August 9, 1980. Within four days, the jail staff had referred him to the mental health staff because he was hallucinating. On August 15, Bee complained to the jail staff because he was not receiving thorazine and threatened to kill himself if the jail refused to provide him with the drug. The jail placed Bee in isolation, and a jail psychiatrist evaluated him. The jail physician prescribed thorazine which Bee took voluntarily at that time.

On August 26, the jail referred Bee to the Utah State Hospital for an evaluation of his competency to stand trial. At the hospital, Dr. Breck Lebegue diagnosed

Bee as a schizophrenic and prescribed thorazine for him. The hospital returned Bee to the jail on September 23, and Dr. Lebegue wrote a letter to the state court stating his opinion that Bee was "competent to stand trial at this time in that he has the ability to comprehend the nature of the charges against him and the punishment specified for the offense charged and has the ability to assist his counsel in his defense." Rec., Vol. I, at 126. See also Utah Code Ann. Section 77-15-2 (1982). the next day, the state court declared after a hearing that Bee was competent to stand trial. By a minute order, the court ordered Bee medicated with thorazine each evening.

Bee took thorazine voluntarily until about October 7, when he complained that he was having problems with the drug. Beginning

October 16, he refused thorazine treatment for five days. The jail's psychiatrist, Dr. Greer, determined that Bee was "decompensating" as a result.[1] He ordered Bee forcibly

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[1]It is unclear from the record what "decompensating" means because the evidence of Bee's behavior when Dr. Greer so characterized him is conflicting. Dr. Greer did not remember the incident but testified that, since he ordered an intramuscular injection "stat" (meaning "right away"), he would "reconstruct a picture" as follows. "[H]e would be thrashing around, he would be disoriented, he would be provocative of assault on himself or assaultive of others at this point. That frightened [sic], and would be refusing oral medication." Rec., vol. V, Greer Dep. at 11. In addition to these conjectures by Dr. Greer, there is evidence that Bee had become loud, often calling for the guard. Id., Vol IV, Mower Dep. at 17. On the other hand, the jail medic who actually administered the thorazine injection to Bee, Keith Hughes, testified that Bee was not acting unusual, that he was not "thrashing around, pounding on the tables or anything like that." Id., Vol III, Hughes Dep. at 21. Indeed, when Hughes found Bee, he was either in the day room (a common meeting area) or in his unlocked and open cell, indicating that Bee was not assaultive or out of control at the time.

medicated with thorazine any time that Bee refused to take his medication orally. On October 21, a jail medic named Keith Hughes and three other jail officers administered Bee's medication forcibly by injection with the express purpose of "intimidat[ing] him so he wouldn't refuse the oral medication anymore." Rec., Vol III, Hughes Dep. at 24. When Bee again refused to take the thorazine on October 23, Hughes and a jail guard threatened Bee with another forcible injection. Confronted with this alternative, Bee acquiesced in an oral dose of thorazine. As late as November 11, more than three weeks after Bee's initial refusal, the jail staff remained under standing orders to forcibly medicate Bee if he refused

the thorazine.[2] Bee took the medicine orally only because of this intimidation.

In the trial court, both sides moved for Summary Judgment. Bee contended that at best the side

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[2]It is unclear whether Dr. Greer intended to order Bee forcibly medicated for this long a time. At Dr. Greer's deposition, the following exchange took place:

"Q. Now, when you say on that notation, it says [']give repeat.['] What does that mean?

"A. That means they would be able to repeat the i.m. medication [intramuscular injection of thorazine] once if he refused the next oral does...I would allow them to repeat it one more time without checking with me.

"Q. And that is what that notation means? Repeat?

"A. Yes. To be specific, [it] should be [']repeat times one[']and that isn't there."

Rec., Vol. V, Greer Dep. at 11 (emphasis supplied).

Regardless of Dr. Greer's intent, however, the jail staff clearly interpreted his notation to mean that Greer authorized them to medicate Bee against his will anytime that he refused oral medication, at least

effects of antipsychotic drugs such as thorazine are extremely disabling, and that at worst they can inflict serious, permanent injury.[3] Defendants did not dispute the possible side effects of thorazine. In fact, Dr. Greer's deposition testimony tends to support Bee's description of the possible

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(footnote 2 continued)

until the staff received different instructions from Greer. Therefore, Bee remained under threat of forcible medication until at least November 11th. He was returned to the state hospital shortly thereafter.

[3]Relying on the cited medical authorities, Bee made the following claims about the possible effects of antipsychotic drugs:

> "Thorazine is an anti-psychotic medication commonly used to relieve the symptoms of schizophrenia such as thought disorder,

adverse consequences of the drug.[4] See generally, Rennie v. Klein, 653 F.2d 836, 843-44 (3rd Cir. 1981)(en banc)(discussing potential adverse side effects of antipsychotic drugs), vacated and remained on other grounds, 458 U.S. 1119 (1982), on remand, 720 F.2d 266 (3d Cir. 1983)(en banc);

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footnote 3 continued

blunted affect, indifference, retardation, hallucinations, paranoid identification, hostility and resistiveness. Davis and Cole, Anti-Psychotic Drugs, Comprehensive Textbook of Psychiatry, Freedman and Kaplan, pp. 921-940. Although beneficial effects are observed in the treatment of schizophrenia with anti-psychotic medications, the

(footnote 3 continued next page)

[4] "Q. What over kind of effects are there when someone is receiving Thorazine?

"A. Well, they get side effects of course, what we call extrapyramical signs. They develop akathisia, involuntary

Davis v. Hubbard, 506 F. Supp. 915, 928-29 (N.D. Ohio 1980)(Same). See also Mills v. Rogers, 457 U.S. 291, 293 n.1 (1982). Defendants asserted

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footnote 3 continued

> mechanism whereby their therapeutic action is exerted is unknown. Physician's Desk Reference, 1978 pp. 1518 through 1615.
>
> "Serious negative side effects regularly accompany the use of anti-psychotic medications. See Plotkin, 'Limiting the Therapeutic Orgy: Mental Patients' Rights to Refuse Treatment,' 72 Northwestern University Law

(footnote 3 continued on next page)

footnote 4 continued

> movements of various kinds, drooling, dry mouth, things like that.
>
> ...
>
> A. .....If he was in an acutely agitated state and threatening to himself and other [sic], those [extrapyramidal] side effects are the last thing you

(footnote 4 continued on next page)

instead that pretrial detainees have no constitutional right to refuse medical treatment while they are incarcerated. Assuming there is such a right in some circumstances, however, defendants also argued that their actions in medicating Bee were

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footnote 3 continued

Review 461 (1977). The most dramatic of the more common side effects produced by antipsychotic medication are known as extrapyramidal disorders. Freedman and Kaplan, Id. These are categorized as pseudo-parkinsonisms (mask-like (footnote 3 continued next page)

(footnote 4 continued)

worry about. Those are not dangerous to the person, they are uncomfortable and over a period of time, they make the patient look weird, so he is estranged from other people, but the extrapyramidal effects are not-- there is a variety which is almost the opposite of akathisia where they become hypersensitive (tardive dyskinesia) that is a dangerous form of side effect."

(Rec., Vol V, Greer Dep. at 13-15.)

based on legitimate governmental concerns that outweighed any constitutional right Bee might have. The trial judge agreed with defendants and in a short decision from the bench granted summary judgment in their favor.

(footnote 3 continued)

> face, tremors, muscle stiffness and ridigity, and shuffling gait), dyskinesia (muscle spasms, especially in the eyes, neck, face and arms, writhing and grimacing movements, protrusions of the tongue) and akathesia (inability to stay still, restlessness and agitation). Other non-muscular side effects include drousiness, weakness, weight gain,

II.

THE RIGHT OF PRETRIAL DETAINEES TO REFUSE ANTIPSYCHOTIC DRUGS

Initially we note the Supreme Court's recognition that pretrial detainees retain certain constitutional rights:

> [W]e have held that convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison...so, for example, our cases have held that sentenced prisoners enjoy freedom of speech and religion under the First and Fourteenth Amendments, ...

(footnote 3 continued)

> dizziness, fainting, dry mouth and blurred vision.
>
> "The most serious threat that thorazine poses to a patient's health is a condition known as tardive dyskinesia. Physician's Desk Reference, p. 1615. Tardive dyskinesia appears in some patients who have undergone

(footnote 3 continued next page)

that they are protected against invidious discrimination on the basis of race under the Equal Protection Clause of the Fourteenth Amendment, ... and that they may claim the protection of the Due Process Clause to prevent additional deprivation of life, liberty, or property without due process of law. ...A fortiori, pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyable by convicted prisoners."

Bell v. Wolfish, 441 U.S. 520, 545 (1979) (citations omitted) (emphasis

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(footnote 3 continued)

long term treatment with anti-psychotic medication or may occur after drug therapy has been discontinued. The syndrome is characterized by rhythmical involuntary movements of the tongue, face, mouth, or jaw. These movements are sometimes accompanied by involuntary movements of one's extremities. There is no known effective treatment for tardive dyskinesia. Plotkin, Id. The condition is not only severe, but widespread. According to a recent study, 50-56% of hospitalized (continued next page)

added). The threshold issue, therefore, is whether pretrial detainees have a constitutional right to refuse treatment with antipsychotic drugs. Bee claims a liberty interest in avoiding the unwanted administration of antipsychotic drugs protected by the Due Process Clause of the Fourteenth Amendment. He grounds the asserted liberty interest in the right to privacy, including the right to make one's own decisions about

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(footnote 3 continued)

> schizophrenics and 41% of outpatients are afflicted with the condition. Sooner, et al. 'Tardive Dyskinesia and Informed Consent, March 1978. Psychosomatice 173."

Rec., Vol. I, at 203-04.

fundamental matters, the rights to personal decisions about fundamental matters, the rights to personal dignity and bodily integrity , and the right to communicate ideas freely.[5] We discuss these grounds seriatim. We

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[5]The Supreme Court reiterated in Mills v. Rogers, 457 U.S. 291, 300 (1982), that a liberty interest may be recognized by a state as well as by the United States Constitution. In that case, the Supreme Judicial Court of Massachusetts recently had recognized a state-created liberty interest in a noninstitutionalized but mentally incompetent person to refuse treatment with antipsychotic drugs. Applying a policy of restraint, the Court remanded the case to the court of appeals to determine whether involuntarily institutionalized mental patients would be accorded a similar liberty interest under state law, a potentially dispositive state law question. The Court thus did not consider whether the plaintiff also had a liberty interest grounded in the Constitution.

In the present case, however, Bee does not argue that Utah would recognize a liberty interest in pretrial detainees to refuse antipsychotic drugs, and we have found no Utah cases that address this issue. Under these circumstances, we will consider the federal issues that

then consider the competing state interests asserted by defendants which weigh against a pretrial detainee's right to refuse antipsychotic drugs.

A. The Interest in Avoiding Unwanted Administration of Antipsychotic Drugs

In Roe v. Wade, 410 U.S. 113 (1973), the Supreme Court stated that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' Palko v. Connecticut, 302 U.S. 319, 325 (1937) are included in this guarantee of personal privacy." 410 U.S. at 152. The determination of

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footnote 5 continued

have been raised. Cf., Youngberg v. Romeo, 457 U.S. 307, 316, n.19 (1982). The parties are not precluded on remand from delineating a state law issue.

whether a right is fundamental begins with an examination of "the teachings of history [and] solid recognition of the basic values that underlie our society." Moore v. City of East Cleveland, 381 U.S. 479, 501 (1965)(Harlan, J., concurring).

In Davis v. Hubbard, 506 F. Supp. 915, a case challenging the conditions at a state mental institution, the court probed the historical basis of the right to refuse unwanted medical treatments and pointed out that the law of torts has long recognized a person's interest in making decisions about his body. In context of medical treatment, the court noted that:

> "....treatment by a physician in a non-emergency that is rendered without the patient's informed consent, or [that] exceeds the consent given, is actionable as a battery. See, e.g., Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905); Pratt v. Davis, 224 Ill. 300, 79 N.E.

562 (1906); Rolater v. Strain, 39 Okl. 572, 137 P. 96 (1913); Schloendorff v. Society of New York Hospitals, 211 N.Y. 125, 105 N.E. 92 (1914) (Cardozo, J.); Wells v. Van Nort, 100 Ohio St. 101, 125 N.E. 910 (1919). The principle which supports the doctrine of informed consent is that only the patient has the right to weigh the risk attending the particular treatment and decide for himself that course of action is best suited for him.

> 'The very foundation of the doctrine of [informed consent] is every man's right to forego treatment or even cure if it entails what for him are intolerable consequences or risks, however, warped or perverted his sense of values may be in the eyes of the medical profession, or even of the community, so long as any distortion falls short of what the law regards as incompetency. Individual freedom here is guaranteed only if people are giving the right to make choices which would generally be regarded as foolish.'

"2F. Harper & F. James, Jr., The Law of Torts 61 (1968 Supp.) (emphasis in original). See also, Cobbs v. Grant, 8 Cal. 3rd 229, 104

Cal. Rptr. 505, 514, 502 P.2d 1, 10 (1972); Schloendorff v. Society of New York Hospitals, supra, 105 N.E. at 93." Id. at 931-32 (footnotes omitted).

The court in Davis concluded that the forced use of antipsychotic drugs represents a significant invasion of an individual's fundamental right to privacy. 506 F. Supp. at 929-30; accord Rennie v. Klein, 653 F.2d at 843-44, vacated and remanded for further consideration, 458 U.S. 1119 (1982), on remand, 720 F.2d 266 (3d Cir. 1983) (en banc); Rogers v. Okin, 634 F.2d 650, 653-54 (1st Cir. 1980), vacated and remanded on other grounds sub nom. Mills v. Rogers, 457 U.S. 291 (1982), on remand, 738 F.2d 1 (1st Cir. 1984).

The conclusion that an individual has a constitutionally protected interest in making his own decision whether to accept or reject the administration of potentially

dangerous drugs is suppored by Whalen v. Roe, 429 U.S. 589 (1977). In Whalen, Justice Stevens for an unanimous court specifically recognized a privacy interest "in independence in making certain kinds of important decisions." Id. at 599-600. Thus, we agree with the court in Davis that the decision whether to accept treatment with antipsychotic drugs is of sufficient importance to fall within this category of privacy interests protected by the constitution.

The Court recently suggested yet another possible basis for a liberty interest in the instant case. In Youngberg v. Romeo, 457 U.S. 307 (1982), the court reaffirmed that "'[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause of arbitrary

governmental action'" Id. at 316 [quoting Greenholtz v. Nebraska Penal Inmates. 442 U.S. 1, 18 (1979)(Powell, J., concurring in part and dissenting in part).] The court stated that this interest survives criminal conviction and incarceration. In Romeo, a severely retarded man who had been involuntarily committed to a mental institution was subjected to physical soft restraints. If incarcerated individuals retain a liberty interest in freedom from bodily restraints of the kind in Romeo then a fortiori they have a liberty interest in freedom from physical and mental restraint of the kind potentially imposed by antipsychotic drugs. See Project Release v. Prevost, 551 F. Supp. 1298, 1309 (E.D.N.Y. 1982), aff'd, 722 F.2d 960 (2d Cir. 1983).

The Supreme Court's decision in Vitek v. Jones, 445 U.S. 480

(1980), is most pertinent to the present case because it involved the treatment of an allegedly mentally unstable prisoner. There the Court recognized that "'[a]mong the historic liberties' protected by the Due Process Clause is the 'right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security.'" Id. at 492 [quoting Ingraham v. Wright, 430 U.S. 651, 673 (1977)]. See also Romeo, 457 U.S. at 316; Breithaupt v. Abram, 352 U.S. 432, 439 (1957). The Court held in part that "[c]ompelled treatment in the form of mandatory behavior modification programs" is a proper factor to be considered in determining whether a prisoner's liberty interest in personal security has been infringed. Vitek, 445 U.S. at 492. The Court concluded:

> "A criminal conviction and sentence of imprisonment extinguish an individual's right to freedom from confinement for the term of his sentence, but they do not authorize the State to classify him as mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protections."

Id. at 943-94 (emphasis added).[6] The required due process protections included notice to the prisoner of the proposed action, a hearing, and an independent decision maker.

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[6]In Vitek, the Court was faced with the added factor of stigmatization of the prisoner by his transfer to a mental health hospital. Nonetheless, given the potential of antipsychotic drugs for causing severe mental and physical effects, including possible irreversible damage, we do not view this distinction as significant to our analysis. The potential loss of liberty in this case appears at least as great as the potential for stigma in Vitek.

Recognizing that a medical question was involved, the Court nevertheless said:

> "The medical nature of the inquiry, however, does not justify dispensing with due process requirements. It is precisely '[t]he subtleties and nuances of psychiatric diagnoses' that justify the requirement of adversary hearings." [Id at 495 (quoting addington v. Texas, 441 U.S. 418, 430 (1979)].

Bee also contends that this case raises First Amendment concerns,

and we agree. The First Amendment protects the communication of ideas, which itself implies protection of the capacity to produce ideas. See Rogers v. Okin, 478 F. Supp. 1342, 1366-67 (D. Mass. 1979), aff'd in part and rev'd in part, Rogers v. Okin, 634 F.2d 650 (1st Cir 1980), vacated and remanded on other grounds sub nom. Mills v. Rogers, 457 U.S. 291 (1982). Antipsychotic drugs have the capacity to severely and even permanently affect an individual's ability to think and communicate. See, e.g., Davis, 506 F. Supp at 927-29.

> "In a social whose 'whole constitutional heritage rebels at the thought of giving government the power to control men's minds, the governing institutions, and especially the courts, must not only reject direct attempts to exercise forbidden domination over mental processes; they must strictly examine as well oblique intrusions likely to produce, or designed to produce, the same result."

L. Tribe, American Constitutional Law Section 15-5, at 899 (1978)[quoting Stanley v. Georgia, 394 U.S. 557, 565 (1969)]. See also id. Section 15-8.

Given the undisputed nature of antipsychotic drugs, we hold that a pretrial detainee retains a liberty interest derived from the Constitution in avoiding unwanted medication with such drugs. That does not end our analysis, however, for the protected interest is not absolute. See Romeo, 457 U.S. at 319-320. It must be balanced against competing state interests to determine whether it is outweighed by "'the demands of an organized society."" Id. at 320 [quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (harlan J., dissenting)].

B. Competing State Interests

Pretrial detainees do "not possess the full range of freedoms of

an unincarcerated individual." Bell v. Wolfish, 441 U.S. at 546; accord Block v. Rutherford, 104 S.Ct. 3227 (1984). The Court acknowledged in Wolfish that pretrial detainees retain certain constitutional rights but held that "'[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.'" 441 U.S. at 545-46. [quoting Price v. Johnston, 334 U.S. 266, 285 (1948)]. "[E]ven when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security." Id. at 547. Moreover, prison administrators must be accorded:

> "...wide-ranging deference in the adoption and execution of [prison] policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security ... '[I]n the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.'"

Id. at 547-48 [quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)] (citation omitted) (emphasis added).

Defendants assert three state concerns which they claim outweigh any liberty interest Bee may have in freedom from unwanted antipsychotic drugs: (1) the right and duty of the jail to treat a mentally ill detainee; (2) the jail's interest in maintaining the detainee in a competent condition to stand trial; and (3) the jail's duty to maintain security and to prevent a violent and dangerous

mentally ill prisoner from injuring himself and others. Each of these asserted interests must be judged in light of above-quoted admonitions in Wolfish. The trial judge granted summary judgment for defendants without weighing Bee's constitutionally protected interest against the reasons offered by the state for forcibly injecting him with antipsychotic drugs. Moreover, the record establishes contested issues of fact material to this balancing process. We therefore must remand this case for the trial court's further consideration under the guidelines outlined below.

The first interest asserted is not a legitimate state concern in this case. True, the jail is under a constitutional duty to treat the medical needs of pretrial detainees, Jones v. Diamond, 636 F.2d 1364, 1378 (5th Cir. 1981), and such treatment

includes mental as well as physical disorders, cf. Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977). The premise underlying this duty is that the state may not deliberately fail to provide necessary medical treatment when it is desired by the detainee. Medical treatment is designed to ensure that the conditions of pretrial detention do not amount to the imposition of punishment. Wolfish, 441 U.S. at 535. This constitutional requirement cannot be turned on its head to mean that if a competent individual chooses not to undertake the risks or pains of a potentially dangerous treatment, the jail may force him to accept it. Absent legitimate government objectives such as those discussed below, we believe that involuntary medication may itself amount to unconstitutional punishment.

Second, the jail contends that it was entitled to inject Bee

forcibly with thorazine in order to keep him competent for trial. As we noted initially, however, the state court found after a hearing "that Daniel H. Bee is not mentally ill and is competent to stand trial." Rec., Vol I, at 132 (emphasis added). iven this determination, the state's asserted interest in keeping Bee competent to stand trial is not implicated in this case; therefore it cannot serve to override Bee's interest in avoiding forcible medication with antipsychotic drugs.

Moreover, although the state undoubtedly has an interest in bringing to trial those accused of a crime, we question whether this interest could ever be deemed sufficiently compelling to outweigh a criminal defendant's interest in not being forcibly medicated with antipsychotic drugs. With their potentially dangerous side effects,

such drugs may not be administered lightly. Generally speaking, a decision to administer antipsychotics should be based on the legitimate treatment needs of the individual, in accordance with accepted medical practice. A state interest unrelated to the well being of the individual or those around him simply has no relevance to such a determination. The needs of the individual, not the requirements of the prosecutor, must be paramount where the use of antipsychotic drugs is concerned.

Indeed, Utah has recognized the right of a mentally ill person not to be subjected to involuntary medical treatment absent a hearing at which the court finds inter alia that "[t]he patient lacks the ability to engage in a rational decision-making process regarding the acceptance of mental treatment as demonstrated by evidence of inability to weigh the possible

costs and benefits of treatment." Utah Code Ann. Section 64-7-36(10)(c) (Supp. 1983). The statute's requirements that the individual must be found incompetent to consent to treatment has been interpreted to mean that he must be found incompetent to consent to proposed medication. See A.E. v. Mitchell, 724 F.2d 864, 867-68 (10th Cir. 1983). No such determination has been made with regard to Bee.

The third interest asserted by defendants is the jail's duty to protect the jail staff and others from a violent detainee. Admittedly, this is a serious concern. See Block v. Rutherford, 52 U.S.L.W. 5063 (1984). Bee does not dispute that forcible medication with antipsychotic drugs may be required in an emergency. Absent an emergency, however, we do not believe forcible medication with antipsychotic drugs is "reasonably

related," Wolfish, 441 U.S. at 539, to the concededly legitimate goals of jail safety and security.

Determining that an emergency exists sufficient to warrant involuntary medication with this type of drug requires a professional judgment-call that includes a balancing of the jail's concerns for the safety of its occupants against a detainee's interest in freedom from unwanted antipsychotics. Any decision to administer antipsychotic drugs forcibly must be the product of professional judgment by appropriate medical authorities, applying accepted medical standards. Cf. Youngberg v. Romeo, 457 U.S. 307, 321-23 (1983); Rennie v. Klein, 720 F.2d 266, 269 (3rd Cir 1983). It requires an evaluation in each case of all the relevant circumstances, including the nature and gravity of the safety threat, the characteristics of the

individual involved, and the likely effects of particular drugs.

The availability of alternative, less restrictive courses of action should also be considered. In view of the severe effects of antipsychotic drugs, forcible medication cannot be viewed as a reasonable response to a safety or security threat if there exist "less drastic means for achieving the same basic purpose." Shelton v. Tucker, 364 U.S. 479, 488 (1960); see also Illinois State board of Elections v. Socialist Workers Party, 440 U.S. 173, 185 (1979). Our constitutional jurisprudence long has held that where a state interest conflicts with fundamental personal liberties, the means by which that interest is promoted must be carefully selected so as to result in the minimum possible infringement of protected rights. See, e.g., Griswold v. Connecticut,

381 U.S. 479, 485 (1965) (governmental purpose "may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms") [quoting NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 307 (1964)]; Shelton, 364 U.S. at 488 (governmental purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved"). Thus, less restrictive alternatives, such as segregation or the use of less controversial drugs like tranquilizers or sedatives, should be ruled out before resorting to antipsychotic drugs.[7]

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[7]We recognize that the Supreme Court has declined to apply a "less intrusive means" analysis to a decision regarding treatment of an involuntarily committed mental patient. See Romeo, 457 U.S. at 322-24. Romeo is distinguishable both

In granting summary judgment for defendants in this case, the district court did not determine whether an emergency existed. Summary Judgment may be granted only where there is no doubt from the evidence,

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footnote 7 continued

because it involved temporary physical restraints rather than mental restraints with potentially long-term effects, see Rennie v. Klein, 720 F.2d 266, 274-77 (3d Cir. 1983) (Weis, J., concurring), and because Romeo had been certified as severely retarded and unable to care for himself, see Romeo, 457 U.S. at 309-10. In this case, the question is whether an emergency exists sufficient to justify the state injecting pretrial detainee, who has not been declared mentally incompetent under appropriate state procedures, with a potentially dangerous drug. Under these circumstances, we believe the state is required to consider less restrictive alternatives. Cf. Wolfish, 441 U.S. at 574 (Marshall, J., dissenting) ("There is no basis for relaxing this [less restrictive alternatives] requirement when the rights of presumptively innocent detainees are implicated."). Indeed, the jail regulations of the detention center in this case specifically suggest segregation as the appropriate measure when mentally ill patients "upset or

with all inferences drawn in favor of the nonmoving party, that no genuine issue of material fact remains for trial and that the moving party is entitled to judgment as a matter of law. See, e.g., Houghton v. Foremost Financial Services Corp., 724 F.2d 112, 114 (10th Cir. 1983); Cayce v. Carter Oil Co., 618 F.2d 669, 672-73 (10th Cir. 1980); Madison v. Deseret Livestock Co., 574 F.2d 1027, 1036 (10th Cir. 1978). Whether an emergency actually existed in this case is a disputed fact issue that precludes the grant of Summary Judgment. See supra note 1. In the event an emergency did exist, there is

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footnote 7 continued

provoke" other inmates. See Jail Reg. 4/04-04.04(1), rec., vol I, at 153. The jail regulations also contemplate that commitment "shall be considered for inmates with moderate to severe mental problems" See id. .04(2)(a), rec., vol. I, at 153.

also a material issue of fact as to whether forcible medication for an indefinate period was an "exaggerated response" in this case. See Wolfish, 441 U.S. at 548.

The summary judgment in favor of defendants is reversed and the case is remanded for further consideration in light of this opinion.[8]

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[8]Certain of the defendants argue that they should be dismissed from the lawsuit because it has not been shown that they participated in the alleged constitutional violations. The trial court did not address these arguments and we think that court is the more appropriate forum to do so in the first instance.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

CENTRAL DIVISION

DANIEL HOWARD BEE, et al.,	*	ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANTS
Plaintiff	*	
-vs-	*	
SALT LAKE COUNTY, et al.,	*	Civil No. C-80-0697A
Defendants.	*	

The parties' motions for Summary Judgment came on regularly for hearing before the Court, the Honorable Aldon J. Anderson, United States District Court Judge, presiding, on Thursday, February 11, 1982, at 2:00 p.m,. Plaintiff was represented by Brian M. Barnard and defendants were represented by Patricia J. Marlowe, Deputy County

Attorney. The Court having heard arguments by counsel, having considered the Magistrate's Report and Recommendation, the parties' memoranda in support of their motions for Summary Judgment and all pleadings, depositions and other documents on file and the Court having determined that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law for the reasons announced in open court, and the Court having announced its opinion in open court;

IT IS HEREBY ORDERED, ADJUDGED and DECREED that defendants' Motion for Summary Judgment be and hereby is granted for the reasons set forth in the Court's decision announced in open court on Thursday, February 11, 1982.

DATED this _____ day of February, 1982.

BY THE COURT:

_____
ALDON J. ANDERSON
United States District
Court Judge

APPROVED AS TO FORM:

_____
BRIAN M. BARNARD
Attorney for Plaintiffs

_____
PATRICIA J. MARLOWE
Deputy County Attorney
Attorney for Defendants.

APPENDIX C

UTAH CODE ANNOT. 1953, as amended:

77-15-1:

Incompetent person not to be punished for crime.

No person who is incompetent to proceed shall be tried or punished for a public offense.

77-15-2:

"Incompetent to proceed" defined.

For the purposes of this chapter, a person is incompetent to proceed if he is suffering from a mental disease or defect resulting either:

1) In his inability to comprehend the nature of the proceedings against him or the punishment specified for the offense charged; or

2) In his inability to assist his counsel in his defense.

Petition for inquiry as to defendant or prisoner -- filing contents.

1) Whenever a person who is charged with a public offense or who is serving a sentence of imprisonment, is or becomes incompetent as defined in this chapter, a petition may be filed in the district court of the county where the charge is pending or where the person is confined.

2) The petition shall set forth the facts upon which the allegations of incompetency to proceed are based. The petition may be based upon knowledge or information and belief and may be filed by the party alleged incompetent to proceed, and any person acting on his behalf, the prosecuting attorney, or any person having custody or supervision over the person.

77-15-5, Order for Hearing

Examinations of defendant or prisoner -- Stay of other proceedings.

1) Where a petition is filed pursuant to section 77-15-3, the court shall enter an order for a hearing on the mental condition of the person who is the subject of the petition.

2) Prior to the hearing the court may:

(a) Order the person to be committed to the Utah state hospital, or to another facility for an evaluation not to exceed a period of 30 days based on examination, observation or treatment; or

b) Appoint two or more alienists to examine the person and to be present at the hearing to give testimony concerning the mental condition of such person.

3. Upon completion of the evaluation or examination under subsection (2), a written report shall be submitted to the court setting forth the opinions of the alienists as to the mental condition of the person. The report shall state the facts relied on as the basis for the opinion and shall be made available to the prosecuting and defense attorneys.

4. After examination, the defendant may be returned to his original custody or status pending the hearing date, as the court may order.

5. When the report is received the court shall set a date for the mental hearing which shall be held in not less than five and not more than 15 days. The hearing shall be conducted as provided in section 64-7-36. The alienist who may have been previously appointed to examine the person or who may otherwise have

knowledge of the mental condition of the person, may be subpoenaed to testify at the hearing.

6. All other proceedings pending against the defendant shall be stayed until the proceedings to determine his mental condition are terminated.

77-15-6:

Commitment on finding of incompetency -- Subsequent hearings -- notice to prosecuting attorneys.

If, after hearing, the person is found to be incompetent, the court shall order him committed to the Utah state hospital or to another mental health facility until the court which has committed him or the district court of the county wherein he is confined, after notice and hearing, finds that he is competent to proceed. Notice of such hearing shall be given to the prosecuting attorney

for the county from which the defendant was committed. If the hearing is held in the county where the defendant is confined, notice shall also be given to the prosecuting attorney for that county.

77-15-7:

Hearing on condition of person committed -- Frequency.

1. A person committed pursuant to section 77-15-6 may apply, not sooner than six months from the date of the order of commitment, to the district court of the county in which he is confined or for the county from which he was committed, to be returned for trial or confinement on the grounds that he is now competent to proceed. At any time that the defendant has recovered from his mental illness, the clinical director of the hospital or other facility shall certify that fact to the court.

The court shall conduct a hearing within ten working days of the receipt of the clinical director's report. If the finding of the court is adverse to the defendant, he shall not be permitted another hearing more often than once each year, unless the court otherwise orders. In such hearings the burden of proving that he is competent to proceed is on the applicant.

2. The court, on its own motion, or upon recommendations of authorities of the mental health facility, may order a hearing or rehearing at any time.

77-15-9:

Expenses of examination, confinement and treatment.

1. Any expenses of examination including travel to and from any mental health facility shall be charged to the county in which prosecution is commenced.

2. When examination is initiated by the court or on motion of the prosecutor, expenses of commitment and treatment of the person confined to a mental health facility after examination shall also be charged to the county in which prosecution is commenced. When examination is initiated by the accused, the county may recover expenses of treatment and commitment from his estate.

3. Expenses of examination, treatment, or confinement in a mental health facility, for any convict in the state prison, shall be charged to the state.

4. The clerk of the district court which ordered an examination to be held shall certify the costs to the state auditor, or to the board of county commissioners, as the case may be.

APPENDIX D

Darr's v. Hubbard, 506 F.Supp. 915 (1980)

Nelson v. Heyne, 355 F.Supp. 451 (1972)

Nelson v. Heyne, 491 F.2d 352 (7th Cir. 1974) cert. denied 417 U.S. 976 (1974)

Peek v. Ciccone, 288 F.Supp. 329 (1968)

Pena v. N.Y. State Division for Youth, 419 F.Supp. 203 (1976)

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APPENDIX E

64-7-47: Mechanical restraints -- Clinical record.

Mechanical restraints shall not be applied to a patient unless it is determined by the clinical director of the patient. Every use of a mechanical restraint and the reasons therefor shall be made a part of the clinical record of the patient under the signature of the clinical director or a designee and shall be reviewed regularly. In no event shall medication be prescribed for a patient unless it is determined by a physician to be required by the patient's medical needs. Every use of a medication and the reasons therefor shall be made a part of the clinical record.

Office-Supreme Court, U.S.
FILED
JAN 28 1985
ALEXANDER L. STEVAS,
CLERK

(2)

Case No. 84 - 1000

IN THE SUPREME COURT

OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1984

DR. KEITH GREAVES, M.D., MEDIC
KEITH HUGHES, DR. ROBERT GREER, M.D.,
SALT LAKE COUNTY, et al.,
PETITIONERS,
-vs-
DANIEL HOWARD BEE,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

TO PETITION FOR WRIT OF CERTIORARI

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DATED: JANUARY 28, 1985

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DATED: JANUARY 28, 1985

QUESTION PRESENTED

DID THE APPELLATE COURT BELOW RULE CORRECTLY WHEN IT HELD:

JAIL PHYSICIANS AND JAIL STAFF CANNOT FORCE A COMPETENT PRE-TRIAL DETAINEE TO TAKE DANGEROUS ANTI-PSYCHOTIC MEDICATIONS ON A NON-EMERGENCY BASIS WITHOUT THE CONSENT OF THE DETAINEE AND WITHOUT ANY DUE PROCESS PROTECTIONS.

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BRIEF OF RESPONDENT IN OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI

THE RESPONDENT, DANIEL HOWARD BEE, by and through his counsel of record, BRIAN M. BARNARD, of Utah Legal Clinic submits the following BRIEF in Opposition to the Petition for Writ of Certiorari filed by the Defendants-Appellees below.

STATEMENT OF CASE

The Trial Court below, the United States District Court for the District of Utah granted a Summary Judgment for the Petitioners. The United States Court of Appeals for the Tenth Circuit reversed and remanded the matter, finding that there were substantial and material issues of fact, thus the granting of a Summary Judgment was inappropriate.

The mandate has issued; the matter has been remanded to the Trial Court. The matter is proceeding toward trial; a scheduling conference is set for February 12, 1985.

STATEMENT OF FACTS

This matter was presented to the Trial Court on cross motions for Summary Judgment. The Court of Appeals reviewed the Summary Judgment granted to the Defendants-Appellees by the Trial Court. Thus, there are no factual findings in this matter; both Courts considered the record in the light most favorable to the Respondent, resolved all factual ambiguities and disagreements in his favor, and drew all factual inferences in favor of the non-moving party, the Respondent.

Thus, because of the procedural status of the case, the Court of Appeals considered as "fact" certain material that may or may not be determined to be true upon the remand and trial herein. The materials considered as "fact" by the Court of Appeals are considerably

different from the argumentative presentation of the Petitioners (Petitioners' Brief, pp. 3 - 12). The "facts" considered by the Court of Appeals (Bee v. Greaves, et al, 744 F.2d 1387, 1389-1391; Petitioners' Brief, pp. 2A - 12A) are summarized as follows:

Plaintiff Bee was booked into the Salt Lake County Jail on August 9, 1980. Within four days, the jail staff had referred him to the mental health staff because he was hallucinating. On August 15, 1980 Bee complained to the jail staff because he was not receiving Thorazine and threatened to kill himself if the jail refused to give him the drug. The jail placed Bee in isolation, and a jail psychiatrist evaluated him. The jail physician prescribed Thorazine which Bee took voluntarily at that time.

On August 26, 1980, the state criminal court referred Bee to the Utah State Hospital for an evaluation of his competency to stand trial. At the hospital, Dr. Breck Lebegue, M.D. diagnosed Bee as a schizophrenic and prescribed Thorazine for him. The hospital returned Bee to the jail on September 23, and Dr. Lebegue wrote a letter to the state court stating his opinion that Bee was "competent to stand trial at this time in that he has the ability to comprehend the nature of the charges against him and the punishment specified for the offense charged and has the ability to assist his counsel in his defense." The next day the state criminal court declared, after a hearing, that Bee was competent to stand trial. By an unsigned minute entry, the state criminal court "ordered" Bee medicated with Thorazine each evening. The two

jail physicians involved did not medicate Bee on the basis of that minute entry, but instead made their own evaluation and prescribed Thorazine.

Bee has a history of mental illness, however, during the times pertinent to this action, he was never determined to be incompetent nor was he ever committed to any mental institution. He was evaluated at the Utah State Hospital only as part of the criminal proceeding against him.

Under Utah law the mere fact that a person suffers from mental illness is not sufficient to cause their civil commitment; a person must be found, among other things, (a) to pose an immediate danger of physical harm to others or self if allowed to remain at liberty, and (b) to be unable to engage in a rational decision-making process regarding the

acceptance of mental treatment before he can be civilly committed. (Utah Code Annotated §64-7-36(10), 1953 as amended) Once civilly committed, a person may be forcibly medicated against their will; the finding of inability to engage in rational decision making regarding treatment has been determined to be the necessary finding of "incompetence". A.E. v. Mitchell, 724 F.2d. 864 (10th Cir. 1983).

In jail, Bee took Thorazine voluntarily until about October 7, 1980, when he complained that he was having problems with the drug. Beginning October 16, he refused Thorazine treatment for five days. The jail's psychiatrist, Dr. Greer, determined that Bee was "decompensating" as a result of not taking the Thorazine. Dr. Greer has no independent recollection of the incident when the

medication by force was prescribed and made no factual clinical notes as to the incident, the symptoms displayed or the conduct of Bee. Dr. Greer ordered an immediate intramuscular injection of Thorazine. Dr. Greer then ordered Bee forcibly medicated with Thorazine any time that Bee refused to take Thorazine orally.

At that time, Dr. Greer knew the procedure for securing a civil court order to medicate a mentally ill person against their will but declined to pursue that route. (Record on Appeal, Vol. V Greer Deposition, pp. 38-39) Dr. Greer knew he was violating "a law" when he ordered the medication by force without a court order. (Record on Appeal, Vol. V, Greer Deposition, p. 34-35, p. 38-39)

On October 21, a jail medic named Keith Hughes and three (3) other jail

officers administered Bee's Thorazine forcibly by injection with the express purpose of "intimidat[ing] him so he wouldn't refuse the oral medication anymore." When Bee again refused to take the Thorazine on October 23, Hughes and a jail guard threatened Bee with another forcible injection. Confronted with this alternative, Bee acquiesced in an oral dose of Thorazine. The jail staff was trained to and had the authority to involuntarily medicate inmates if so ordered by the jail physicians. (Record on Appeal, Vol III, Depo. of Hughes, p. 45; pp. 49-50) As late as November 11, more than three (3) weeks after Bee's initial refusal, the jail staff remained under a standing order to forcibly medicate Bee if he refused Thorazine orally. Bee took the medicine orally only because of this intimidation.

When the medic Keith Hughes forcibly administered the drug injection to Bee, Hughes testified that Bee was not acting unusual, that he was not "thrashing around, pounding on the tables or anything like that," and that Bee was in an unlocked and open cell or in the common area of the cell block indicating that Bee was not assaultive or out of control.

The immediate side effects of Thorazine are extremely disabling; Thorazine can inflict serious permanent injury. Anti-psychotic drugs have the capacity to severely and even permanently affect an individual's ability to think and communicate. Davis and Cole, Anti-Psychotic Drugs, Comprehensive Textbook of Psychiatry, Freedman and Kaplan, pp. 921-940; Physician's Desk Reference, 1978, p. 1615; Plotkin, "Limiting the Therapeutic Orgy: Mental Patients' Rights

to Refuse Treatment," 72 Northwestern University Law Review, 461 (1977); Sooner, et al, "Tardive Dyskinesia and Informed Consent," March 1978, Psychosomatics 173; Rennie v. Klein, 653 F.2d 836, 843-44 (3d Cir. 1981), vacated and remanded on other grounds, 458 U.S. 1119, 102 S. Ct. 3506, 73 L.Ed.2d 1381 (1982), on remand, 720 F.2d 266 (3d Cir. 1983); Davis v. Hubbard, 506 F. Supp. 915, 927-929 (N.D. Ohio 1980); Mills v. Rogers, 457 U.S. 291, 293, n. 1, 102 S.Ct. 2442, 2445, n. 1, 73 L.Ed.2d 16 (1982); Record on Appeal, Vol. V, Deposition of Greer, pp. 13-15.

The Respondent Bee concedes that forcible medication with anti-psychotic drugs may be required in an emergency in a jail when dealing with a violent detainee.

The Petitioners do not dispute that they forced medication upon Bee against his will, nor do they dispute the possible adverse consequences of the drug. Instead, they asserted that pretrial detainees have no constitutional right to refuse medical treatment; in the alternative, if there is such a right, they asserted the right was outweighed, in this case, by legitimate governmental concerns of the jail staff.

The Court of Appeals found that there were genuine issues of material fact as to:

(a) Whether an emergency existed to justify the forcible medication, and

(b) Whether the forcible medication for an indefinite period was an exaggerated response.

The case was remanded for the Trial Court's consideration of those issues.

REASONS FOR DENYING THE PETITION

POINT I

THE DECISION BELOW IS CONSISTENT WITH THE RULINGS OF THIS COURT AND THE RULINGS OF OTHER COURTS OF APPEAL.

The Decision below is not in conflict with any decision of this Court nor in conflict with any decision of any other Court of Appeal.

The Right to Refuse Treatment

The Petitioners concede that civilly committed mental patients have a constitutional right to refuse anti-psychotic medication. (Petitioners' Brief, p. 13) They claim that there is a variance among

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the Courts that have considered that issue as to the constitutional basis for the right to refuse treatment, but they do not dispute the existence of that right. However, the Petitioners suggest that the concerns and interests requiring the protection of the rights of civilly committed person from forced medication "do not exist in a jail." Reliance upon the civil committment cases however, is appropriate since Bee was a pre-trial detainee.

The basis for the right to refuse treatment is found in the right to privacy, retained liberty interests of institutionalized persons and the First Amendment to the Constitution. Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977); Davis v. Hubbard, 506 F.Supp. 915

(N.D. Ohio 1980); Youngberg v. Romeo, 457 U.S. 307, 316, 102 S.Ct. 2452, 2458, 73 L.Ed.2d 28 (1982); Vitek v. Jones, 445 U.S. 480 (1980); Rogers v. Okin, 478 F.Supp. 1342, 1366-67 (D. Mass. 1979), aff'd in part and rev'd in part, Rogers v. Okin, 634 F.2d 650 (1st Cir. 1980), vacated and remanded on other grounds sub nom. Mills v. Rogers, 457 U.S. 291, 102 S.Ct. 2442, 73 L.Ed.2d 16 (1982); Rennie v. Klein, 653 F.2d 836 (3rd Cir. 1981), vacated and remanded on other grounds, 458 U.S. 1119, 102 S.Ct. 3506, 73 L.Ed.2d 1381 (1982), on remand, 720 F.2d 266 (3rd Cir. 1983). Those basis apply to pre-trial detainees in a jail.

Fundamental personal rights are protected by the constitutional "right to privacy." Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Whalen

v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977).

A pre-trial detainee does not have the right to be free of all discomfort; certain discomforts occur and are reasonably incident to pre-trial detention; Bell found such discomforts not to rise to the level of a fundamental liberty interest as protected by Roe v. Wade and Whalen v. Roe. Bell, 441 U.S. at 534; 60 L.Ed.2d 447, at 465. The Decision Below is not concerned with "discomfort" but the substantial and fundamental right not to be forced to take dangerous drugs with severe side effects.

Throughout our legal history, improper invasions of body integrity, including unconsented medical treatment have been recognized as a tort. The determination that that right is "fundamental" comes after an examination of

history and a recognition of the basic values of our society. Historically and based upon the principles of our society, an invasion of one's body by forced medication involves a fundamental right and must be protected by the "right to privacy." Davis v. Hubbard, 506 F.Supp. 915 (N.D. Ohio 1980); Bee at 1392.

A second protected liberty interest is freedom from bodily restraints. This Court held that persons civilly institutionalized by the state retain the right to be free from bodily restraints. Youngberg v. Romeo, 457 U.S. 307, 316, 102 S.Ct. 2452, 2458, 73 L.Ed.2d 28 (1982); see also Milonas v. Williams, 691 F.2d 931 (10th Cir. 1982) holding that juveniles in a detention facilities have the right to be free from physical restraints.

Youngberg also acknowledged that this interest from physical restraints was a right retained by sentenced prisoners. Thus, that right is also retained by pre-trial detainees such as the Respondent. The restraining effects of the drug Thorazine are much more pervasive than the traditional bodily restraints -- manacles and shackles. Through the frightening wonders of modern pharmacology, an injection, more efficiently performs the task of those traditional body restraints by dulling the senses, and controlling the mind and its ability to control the body.

In Vitek this Court acknowledged another liberty interest retained by a sentenced prisoner: the right to be free from arbitrary transfer to a mental institution and involuntary psychiatric treatment. Involuntary treatment

incident to a transfer to a mental institution without appropriate due process protections was determined by this Court to be an unjustified intrusion of personal security. Vitek v. Jones, 445 U.S. 480 (1980) supports the finding of a liberty interest for pre-trial detainees refusing medications.

Changes in conditions of confinement having a substantial impact on a prisoner are not alone sufficient to invoke the protections of due process, so long as the condition or degree of confinement was within the scope of the sentence imposed upon the prisoner. Vitek v. Jones, 445 U.S. 480, 493, 63 L.Ed.2d 552, 565 (1980) citing Montanye v. Haymes, 427 U.S. at 242, 49 L.Ed.2d 466, 96 S.Ct. 2543. Montanye involved a prison transfer from one maximum security facility to another maximum facility; this Court held

that such confinement and such a transfer was clearly contemplated as part of a sentence. This Court in Vitek determined that due process protection applied because the transfer to a mental institution and the involuntary administration of psychiatric treatment was not within the scope of the sentence imposed upon the prisoner.

Both Vitek and Montanye dealt with prisoners and the sentences imposed upon them. Bee is neither a prisoner nor sentenced.

Under Vitek if involuntary mental treatment is not a contemplated part of an inmate's sentence, it cannot be a reasonable contemplated part of pre-trial detention.

Another constitutional basis for the right to refuse forced injection of a mind affecting anti-psychotic drug is the

First Amendment. The First Amendment includes the right to think, the capacity to produce ideas and communicate. Rogers v. Okin, 478 F.Supp. 1342, 1366-67 (D. Mass. 1979), aff'd in part and rev'd in part, Rogers v. Okin, 634 F.2d 650 (1st Cir. 1980), vacated and remanded on other grounds sub nom. Mills v. Rogers, 457 U.S. 291, 102 S.Ct. 2442, 73 L.Ed.2d 16 (1982). The administration of Thorazine devastates the ability of a person to think and to communicate.

In Mills v. Rogers, 457 U.S. 291 (1982), this Court granted certiorari to decide whether "involuntarily committed mental patients have a constitutional right to refuse treatment with antipsychotic drugs", id. at 293, a common form of treatment in the nation's mental institutions. Finding that "both the substantive and procedural issues

[inherent in the right to refuse treatment issue] are intertwined with questions of state law," this Court remanded the case to the First Circuit. Id. at 299, 306. Before doing so, however, this Court identified the relevant procedural and substantive issues:

> The parties agree that the Constitution recognizes a liberty interest in avoiding the unwanted administration of anti-psychotic drugs. Assuming that they are correct in this respect, the substantive issue involves a definition of that protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it. The procedural issue concerns the minimum procedures required by the Constitution for determining that the individual's liberty interest actually is outweighed in a particular instance. Id. at 299. [citations omitted].

Lower federal court decisions prior to Mills had recognized, as Mills appears to accept, a liberty interest in avoiding

the unwanted ingestion of anti-psychotic drugs, e.g., Thorazine, Mellaril, Prolixin, and Haldol. Rennie v. Klein, 653 F.2d 836 (3rd Cir. 1981), vacated and remanded on other grounds, 458 U.S. 1119, 102 S. Ct. 3506, 73 L.Ed.2d 1381 (1982), on remand, 720 F.2d 266 (3d Cir. 1983); Davis v. Hubbard, 506 F. Supp. 915 (N.D. Ohio, 1980). That liberty interest is a fundamental one because the forced medication - particularly the forced over-medication - of patients can result in an extraordinary loss of personal autonomy, and can produce severe side-effects, e.g., the loss of motor control associated with tardive dyskinesia. See Rogers v. Okin, 478 F. Supp. 1342, 1359-60 (D. Mass. 1979), aff'd in part and rev'd in part, 634 F.2d. 650, 653 (1st Cir. 1980), remanded sub nom, Mills v. Rogers, 457 U.S. 291, 102 S.Ct. 2442, 73 L.Ed 2d 16

(1982), opinion in response to certification, 390 Mass. Adv. Sh. 489 (S. Jud. Ct. 1983), on remand, 738 F.2d 1 (1st Cir. 1984).

Dangerous Medication

In Rogers v. Okin, 478 F. Supp. at 1360, the Court cited studies indicating that 41% to 56% of chronically hospitalized schizophrenics suffer from tardive dyskinesia a permanent disabling side effect of the use of Thorazine. For a listing of the other severe side-effects that can accompany the use of antipsychotic drugs, see Brooks, The Constitutional Right To Refuse Antipsychotic Medications, 8 Bull. Am. Acad. of Psychiatry and Law 179, 183 (1980); A Common Law Remedy For Forcible Medication of the Institutionalized Mentally Ill, 82 Colum. L. Rev. 1720, 1726-1727 (1982).

There is a right to refuse treatment based upon the right to privacy, liberty interests and the First Amendment of the Constitution. Such a right becomes stronger when the person is threatened with the forcible ingestion of dangerous anti-psychotic medications that may cause severe and permanent harm.

Pre-Trial Detainee Status

The Respondent was, at all times pertinent to this action, a pre-trial detainee awaiting a criminal trial. But for his inability to post bail, he would have been a free man (albeit with a mental illness) walking the streets, awaiting trial.

The rights of an ordinary citizen and the rights retained by a pre-trial detainee include the right to be free

from involuntary treatment for mental illness.

In Bell v. Wolfish, 441 U.S. 520 (1979) this Court upheld certain conditions of confinement in a federal criminal custodial facility against a challenge by pre-trial detainees. In determining whether the conditions were constitutionally permissible as to pre-trial detainees this Court applied two tests. First,

> In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee. For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law. [emphasis added]

Id. at 535.

The test of whether particular restrictions constitute punishment is

"whether they are rationally related to a legitimate nonpunitive governmental purpose and whether they appear excessive in relation to that purpose." Id. at 561.

Secondly, in addition to the right to be free of punishment, "pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners." Id. at 545. Thus, although a particular restriction of a pre-trial detainee may not constitute punishment, it may, nevertheless, be constitutionally impermissible.

Among those rights retained by convicted prisoners (and, hence, by pre-trial detainees) are:

> --"freedoms of speech and religion under the First and Fourteenth Amendments," and,
>
> --"protection of the Due Process Clause to prevent additional

> deprivation of life, liberty, or property without due process of law."

Id. at 545. (citations omitted) Limitations on such rights may be justified only by "legitimate goals and policies of the penal institution." Id. at 546.

Applying those two tests in Bell, this Court upheld certain practices and restrictions of the custodial facility having found the practices and restrictions to be reasonable responses to the "essential" goal of safeguarding security and therefore not violative of the "retained" rights of the pre-trial detainees. Id. at 546, 550-560. The practices and restrictions in Bell did not violate the pre-trial detainees' additional right to be free of punishment since they were not imposed with punitive intent, were rationally related to

permissible nonpunitive governmental purposes, were not shown to be an "exaggerated" response to the "genuine security considerations that actuated" them, and were of only limited duration as applied to pre-trial detainees. Id. at 541, 560-562.

Unlike the restrictions and practices in Bell, the conduct toward the Respondent violated the "retained" rights of even convicted inmates. Thus, although the forcible injection of anti-psychotic drugs and the severe concomitant effects may easily be regarded as punishment, such treatment is unconstitutional regardless of whether it is labelled as "punishment."

The right to be free of involuntary psychiatric treatment was added to the list of constitutional rights retained by convicted inmates enumerated in Bell,

(and, thus, retained by pre-trial detainees), by this Court in Vitek v. Jones, 445 U.S. 480 (1980).

Vitek held that a state may not transfer a convicted inmate to a mental institution without his consent unless certain minimum due process procedures are afforded the inmate. This Court stated:

> A criminal conviction and sentence of imprisonment extinguish an individual's right to freedom from confinement for the term of his sentence, but they do not authorize the state to classify him as mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protections. Id. at 493-494.

As in Vitek, the conduct toward the Respondent is qualitatively different from passive jail conditions, as in Bell, that simply interfere with a pre-trial detainee's "understandable desire to be as comfortable as possible during his confinement." 441 U.S. at 534. None of

the restrictions approved in Bell compare in severity to the dangerous conduct toward the Respondent. In Bell there were no physical intrusions into detainees' bodies, no interference with their free thought processes, and no danger of permanent physical disability as a result of the conditions of their confinement. All of those consequences were visited upon the Respondent. These grievous invasions suffered by the Respondent, simply because he could not afford bail, cannot be condoned under the holding in Bell.

The loss of liberty interest by the Respondent was as severe as that imposed on the inmate in Vitek. A major concern in Vitek was the imposition of "compelled treatment in the form of mandatory behavior modification programs," as an infringement of the "'right to be free

from, and to obtain judicial relief for, unjustified intrustions on personal security.'" 445 U.S. at 492. (citation omitted) The Respondent was subjected to a physical intrusion into his body as well as a pervasive, oppressive and inescapable control over the intimate processes of his mind. The Petitioners claim the right to circumvent the import of the Vitek decision by inflicting involuntary psychiatric treatment on detainees in a custodial facility rather than a mental institution. As discussed below, none of the goals of a custodial facility justify the Petitioners' failure to afford the Respondent due process before imposing unwanted and dangerous psychiatric treatment.

Legitimate Non-Punitive Governmental Purposes

The Court of Appeals scrupulously following the Bell decision ruled that if the forced medication of the Respondent served a legitimate non-punitive governmental purpose and the Petitioners were not exaggerated in their response, that the Respondent could be medicated against his will. Absent such legitimate governmental objectives the Court suggested that involuntary medication may itself amount to unconstitutional punishment. Bee, 744 F.2d 1387, 1395.

The Court of Appeals then reviewed the three governmental purposes suggested by the Petitioners as justifying the forced medication: (a) the right and duty of a jail to provide adequate medical care to a mentally ill detainee, (b) the interest in maintaining a detainee competent to stand trial, and (c) jail

security, efficiency and safety. The Court of Appeals stated:

> Each of these asserted interests must be judged in light of the . . . admonitions in Wolfish.

Bee v. Greaves, 744 F.2d 1387, 1394.

In response to the first claimed jail interest, the Decision Below held that there was no legitimate governmental interest in providing a pre-trial detainee medication against his will. Bee, 744 F.2d at 1395. A jail has an obligation to provide adequate medical care including mental health care, to an inmate or a pre-trial detainee. Estelle v. Gamble, 429 U.S. 97 (1976); Dewell v. Lawson, 489 F.2d 112 (10th Cir. 1976); Daniels v. Gilbreath, 668 F.2d 477 (10th Cir. 1982); Jones v. Diamond, 636 F.2d 1364, 1378 (5th Cir. 1981); Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977). That obligation applies only when the

care is needed and wanted by the inmate. Thus, the Decision Below properly held that such a duty "can not be turned on its head" to allow a jail to force medications upon an inmate who did not want or seek care. Petitioners cite no cases to the contrary.

The Decision Below correctly determined that there was no legitimate governmental interest in maintaining the competency of a pre-trial detainee who had been determined by the criminal court to be competent. Bee, 744 F.2d at 1395. The Decision Below also properly held that a decision to medicate a pre-trial detainee should be based upon the legitimate treatment needs of the individual and medical judgment, and not upon the requirements or needs of a prosecutor. Petitioners cite no cases to the contrary.

Another basis for holding that neither of these two claimed jail interests justified the forced medication, the Decision Below noted the Utah civil committment laws. Under Utah law a mentally ill person has the right not to be subjected to involuntary mental treatment absent a hearing which reviews the person's competency. Utah Code Ann. §64-7-36(10)(c) (1953 as amended); Bee, 744 F.2d at 1395; A.E. v. Mitchell, 724 F.2d 864, 867-68 (10th Cir. 1983). Thus, application of these two claimed state interests for forced medication directly violates Utah statutes.

Contrary to Petitioners' claim regarding a governmental interest in the "orderly and efficient management" of a jail (Petitioners' Brief, p. 27, p. 29), the efficient operation of any governmental entity must never be a sufficient

interest to over-ride the civil rights or liberty interests of inmates or pre-trial detainees!

The Petitioners suggest that forced medication is within the contemplated scope of pre-trial confinement; they cite no authority for that proposition. "Privacy" is lost as an incident of pre-trial detention. (Petitioners' Brief, p. 20; Bell, U.S. at 537, L.Ed.2d at 467) The reference in Bell is not to the constitutionally protected "right to privacy" as the Petitioners suggest, but to the common meaning: communal living and the non-private existence of a person in a crowded and supervised jail. The ruling in Bell sets forth what restrictions could be reasonably contemplated as part of pre-trial confinement; forced medication is not a reasonably contemplated

restrictions on a pre-trial detainee's liberty.

The final claimed governmental interest, jail security and safety was considered in the Decision Below. This is a serious and legitimate governmental concern. Block v. Rutherford, ___ U.S. ___, 104 S.Ct. 3227, 82 L.Ed.2d 438 (1984) The Respondent concedes that forcible medication with anti-psychotic drugs may be required in an emergency for jail safety and security. The Decision Below held that absent an emergency the forcible medication is not "reasonably related" to the legitimate governmental goal of jail safety and security. Bee, 744 F.2d 1387, 1395.

Petitioners cite Sconiers v. Jarvis, 458 F.Supp. 37 (1978) for the proposition that an inmate may be forced to take anti-psychotic medication against his

will. In Sconiers the Trial Court found a valid determination by two physicians that a medical emergency existed. In the Decision Below, the case was remanded for a factual consideration as to whether a medical emergency existed. Sconiers is in full accord with the decision and ruling of the Decision Below.

Henderson v. Sec. of Corrections, 518 F.2d 694 (10th Cir. 1975); Coppinger v. Townsend, 398 F.2d 392 (10th Cir. 1968) cited by Petitioners are not relevant. Those cases involve prisoners, and involve a choice of treatment or "second guessing" a physician rather than choosing to have treatment or not. These case are not pertinent to the right to refuse dangerous medical treatment, the issue considered in the Decision Below.

Following Youngberg the Decision Below holds that in an emergency situation, the decision to forcibly medicate

> requires a professional judgment call that includes a balancing of the jail's concerns for the safety of its occupants against a detainee's interest in freedom from unwanted antipsychotics. Any decision to administer antipsychotic drugs forcibly must be the product of professional judgment by appropriate medical authorities, applying accepted medical standards. Cf. Youngberg v. Romeo, 457 U.S. 307, 321-23, 102 S.Ct. 2452, 2461-62, 73 L.Ed.2d 28 (1983); Rennie v. Klein, 720 F.2d 266, 269 (3rd Cir. 1983) It requires an evaluation in each case of all the relevant circumstances, including the nature and gravity of the safety threat, the characteristics of the individual involved, and the likely effects of particular drugs.

Bee, 744 F.2d at 1395-6.

The Decision Below holds that there should be a medical judgment in deciding to forcibly medicate in an emergency, and defers to the medical profession. The Decision Below did not, as the Petitioners wrongly suggest Youngberg requires,

totally defer to a medical judgment to forcibly medicate in a non-emergency situation without the benefits of due process or a civil committment.

The Decision Below held that because of the possible permanent and severe effects of Thorazine, an indefinite order directing forced medication is not a reasonable response, if there exist less drastic means for achieving the same basic purpose. Thus, less restrictive alternatives, such as segregation or the use of less controversial drugs like tranquilizers or sedatives should be ruled out before resorting to anti-psychotic drugs even in an emergency. Bee, 744 F.2d 1387, 1395. See Rogers v. Okin, 478 F. Supp. 1342, 1359-60 (D. Mass. 1979), aff'd in part and rev'd in part, 634 F.2d. 650, 653 (1st Cir. 1980), remanded sub nom, Mills v. Rogers, 457

U.S. 291, 102 S.Ct. 2442, 73 L.Ed 2d 16 (1982), opinion in response to certification, 390 Mass. Adv. Sh. 489 (S. Jud. Ct. 1983) (holding that, absent court approval, a mental institution may treat a nonconsenting mental patient with anti-psychotic drugs only if the patient poses an imminent threat to himself of others and no less intrusive method of treatment is available); on remand, 738 F.2d 1 (1st Cir. 1984).

The holding of the Decision Below that less drastic alternatives should be explored before forced medication was distinguished from the rejection in Youngberg of the "less intrusive means" analysis. Youngberg, 457 U.S. at 322-24, 102 S.Ct. at 2462-63. Youngberg involved temporary physical restraints rather than mental restraints with potentially permanent effects, and involved an

institutionalized person unable to care for himself. The Petitioners herein are required by their own jail regulations to consider less intrusive means. Maintaining order and security in the jail and protecting safety can usually and reasonable be obtained without forced medication. The Decision Below recited

> [W]e believe the state is required to consider less restrictive alternatives. Cf. Wolfish, 441 U.S. at 574, 99 S.Ct. at 1892 (Marshall, J., dissenting) ("There is no basis for relaxing this [less restrictive alternatives] requirement when the rights of presumptively innocent detainees are implicated.") Indeed, the jail regulations of the detention center in this case specifically suggest segregation as the appropriate measure when mentally ill patients "upset or provoke" other inmates. [citation omitted] The jail regulations also contemplate that commitment "shall be considered for inmates with moderate to severe mental problems." [citation omitted]

Bee, 744 F.2d 1387, 1396 n. 7.

Thus, the Court of Appeals properly applied the decision of this Court in

Bell to the case at bar and reviewed the treatment of a pre-trial detainee under the standards set forth in Bell.

The Court of Appeals remanded the matter and directed the Trial Court to determine under the Bell criteria whether there was a legitimate governmental need justifying the Petitioners' conduct and whether the response of the Petitioners to that need was excessive or exaggerated.

POINT II

THE DECISION BELOW AND THE PETITION DO NOT RAISE ANY UNIQUE LEGAL ISSUES.

The decision of the Court of Appeals does not raise any significant nor unique legal issues. There is no special or important reason for review of that

decision on a writ of certiorari by this Court.

The Petitioners, as would most Petitioners, suggest that this case involves an important issue, that the law regarding the issue is unsettled and there is a conflict between analogous decisions made by various Courts of Appeal, and therefore a Writ of Certiorari should be granted.

This case does involve an important issue, but as discussed above that issue was properly dealt with by the Court of Appeals below in conformance with the guidance of the rulings of this Court.

The Petitioners admit that the propriety of forcibly medicating mentally ill but competent pre-trial detainees has never been considered by this Court, nor has it been considered by any federal courts except in this case. (Petitioners'

Brief, p. 12) Therefore, the case law regarding this issue is neither unsettled nor in conflict.

Although this case involves an important issue, there is not sufficient conflict nor lack of consistency in reported decisions on the issue to warrant the intervention and supervision of this Court.

POINT III

THE DECISION BELOW IS INTERLOCUTORY AND MAY BE MOOTED ON REMAND.

This matter has not been tried or resolved on its facts. Essential "facts" of this case are still in dispute. The resolution of those facts may moot the concerns of the Petitioners. Therefore, the question presented is not ripe for consideration; this case is not ready for review by this Court. Brotherhood of Locomotive Firemen v. Bangor & Aroostook

Railroad Co., 389 U.S. 327, 19 L.Ed.2d 560, 88 S.Ct. 437 (1967).

The Trial Court below granted a Summary Judgment for the Petitioners herein. The Court of Appeals reversed and remanded the matter finding that there were substantial issues of fact, thus a Summary Judgment was inappropriate.

The mandate has issued and the matter remanded. The case is proceeding toward trial; a scheduling conference is set for February 12, 1985.

A final factual determination that there was an emergency and that the jail staff responded appropriately will moot the claims and concerns of the Petitioners. Until such time as there is such a final factual determination, this case should not be considered by this Court.

There is a significant state created liberty interest which shall be raised on remand that may be dispositive of this case. Under Utah law a mentally ill person has the right not to be subjected to involuntary mental treatment absent a hearing which determines the person's competency. Utah Code Ann. §64-7-36(10)(c) (1953 as amended); Bee, 744 F.2d at 1395; A.E. v. Mitchell, 724 F.2d 864, 867-68 (10th Cir. 1983). Thus, forced psychiatric treatment of any one without the due process protections of a committment proceeding is contrary to Utah statute. That state created liberty interest may resolve this case; that issue should be considered by the Trial Court as was directed in Mills v. Rogers, 457 U.S. 291 (1982).

CONCLUSION

For the reasons stated herein, the Respondent, Daniel Howard Bee requests this Honorable Court to deny the Defendant-Appellees' Petition for a Writ of Certiorari and to allow this matter to proceed to trial in the United States District Court for the District of Utah for a final factual determination and resolution.

RESPECTFULLY SUBMITTED,

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DATED: JANUARY 28, 1985.